

Cleveland State University
EngagedScholarship@CSU



Cleveland State Law Review

Law Journals

1965

Group Representation by Attorneys as Misconduct

Richard M. Markus

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Legal Profession Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Richard M. Markus, Group Representation by Attorneys as Misconduct, 14 Clev.-Marshall L. Rev. 1 (1965)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Group Representation by Attorneys as Misconduct

Richard M. Markus*

IN 1964 THE UNITED STATES SUPREME COURT plunged into the debate over group legal services, undaunted by volleys and thunder from the organized bar. In *Brotherhood of Railroad Trainmen v. Virginia*,¹ the Court enjoined the State of Virginia from interfering with a union program of referring its members to selected attorneys as counsel in F. E. L. A. cases. By that ruling, the Court has apparently overridden the effect of previously accepted Canons of Ethics, on the ground that their application infringes on constitutionally protected rights. Probably no single judicial decision and no extra-judicial event within the past several decades has so vigorously shaken conservative interpreters of professional legal ethics. The decision continues to be the subject of extensive discussion and debate by the bar associations,² and its full significance and effect may not be understood for many years.

At the heart of this controversy is a dispute that has been raging with increasing vigor over the propriety of arrangements by associations or organizations with counsel to assist or represent their members. The same socio-economic pressures which have called greater attention to that issue for lawyers have likewise affected other professional and quasi-professional activities. Numerous medical clinics have been created which will contractually provide professional medical services to the members of a union or other organization.³ Individual physicians are retained by employers to treat their employees and by unions to treat

* Of the law firm of Sindell, Sindell, Bourne & Markus of Cleveland; B.S., Northwestern Univ.; LL.B., Harvard Univ.; Asst. Prof., Cleveland-Marshall Law School of Baldwin-Wallace College.

¹ 84 S. Ct. 1113, 377 U. S. 1, 12 L. Ed. 2d 89 (1964). The American Bar Association filed a strongly worded brief as *amicus curiae* in support of the decision below which the Court reversed.

² For example, the decision was the subject of scheduled meetings at the 1964 national conventions of both the American Bar Association and the American Trial Lawyers Association. See Program, A. B. A. 87th Annual Meeting, p. 29 (1964); Program, 18th Annual Convention N. A. C. C. A. Bar Association, p. 14 (1964).

³ See Medical Administration Service, Inc., Benefits of Group Practice (1949); Medical Administration Service, Inc., Prepayment Plans for Medical Care; Julius Rosenwald Fund, New Plans of Medical Service (1936).

their members.⁴ Hospital accommodations are commonly paid for by insurance programs whose premiums are a part of group organizational dues or employers fringe benefits.⁵ Associations have been created to provide funeral services to their members.⁶ Trade associations routinely employ public relations personnel, engineers, and scientifically trained researchers, all of whom are intended directly or indirectly to assist the associations' members.

However, legal services have been less available on a group basis, principally because of resistance by the organized bar. That resistance is incorporated in part in national and local Canons of Ethics. Nevertheless, some group legal undertakings are approved by lawyers and non-lawyers alike as socially desirable. The liability insurance policy serves as a means by which the individual obtains specified legal services together with the indemnity rights afforded by the insuring contract.⁷ Some large commercial concerns have chosen to purchase insuring contracts under which the insurer provides adjusting services and legal counsel without any indemnity provision, or under terms by which the entire settlement or judgment is charged back to the insured. These "retrospective risk" type policies are intended to supply adjusting services and professional legal assistance for the policyholder, whose premium rate may be fixed or vary with the settlements or judgments paid by him.⁸ In some foreign coun-

⁴ See Stern, *Medicine In Industry*, 160-90 (1946).

⁵ For an understanding of the previous position of the medical profession, see A. M. A. Bureau of Medical Economics, *Group Hospitalization* (1937); A. M. A., Bureau of Medical Economics, *A Critical Analysis of Sickness Insurance* (1934). Between 1940 and 1960, the number of people in the United States with insurance protection for hospital care increased from 12,312,000 to 131,962,000. The percentage having some form of health insurance protection increased in that period from approximately 10% to approximately 73%. See Angell, *Health Insurance*, 11-12 (1963).

⁶ These plans have existed for many years but have received increased impetus from recent publicity of high funeral expenses.

⁷ For terms of standard automobile liability insurance policies, see 1 Risjord-Austin, *Automobile Liability Ins. Cases* (loose leaf service), pp. 1-56,0000. In 1963, automobile bodily injury liability premiums reached \$2,194,000,000. See Best's *Insurance Reports*, p. xi (1964). Workmen's Compensation liability premiums in that year were \$1,164,000,000. *Ibid.* In addition substantial insurance was written for products liability, professional liability (medical, legal, etc.), aircraft liability, general liability (often as part of a "homeowners" policy), construction and malfeasance bonds, and numerous other types of liability situations. See *The Spectator, Coverage and Forms* (1953).

⁸ See, e.g., *The Spectator, Coverage and Forms*, 187-92 (1953).

tries, group legal services have become commonplace,⁹ but in the United States most other types of group legal retainers have been subjected to attacks of varying intensity by local bar associations.

Proponents of group representation point to at least four justifications: (a) the need, particularly by those without substantial financial resources, to budget the cost of legal services over an extended period of time, (b) the desirability for many to share the risk of events requiring legal services, (c) the power of a group to obtain such services more economically by reason of a better bargaining position and the promise of continuing business, and (d) the ability of a group spokesman to make a more judicious choice among available counsel. Those who oppose further expansion of group legal services cite the following dangers: (a) development of commercialism in the practice of law with resulting lowering of prestige and professional standards, (b) increased ability of non-legal organizations to engage in the unauthorized practice of law, (c) greater opportunity for unscrupulous counsel to solicit business through such groups, and (d) loss of a direct professional relationship between attorney and client arising from increased authority of the intermediary group.

This article is intended to consider the future of group retainers in light of these conflicting views. Attention will first be given to the "Canons of Professional Ethics"¹⁰ which affect this subject and the judicial decisions interpreting them. Next, an attempt will be made to evaluate the effect of the Supreme Court *Brotherhood* case, and other related decisions, upon the Canons. Finally, an effort will be made to anticipate the prospects of group legal service with a view towards implementing or modifying present standards.

The Canons of Ethics

The Canons of Ethics were originally adopted by the American Bar Association in 1908; they have been supplemented and

⁹ See Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940); Feather, *The Essence of Trade Unionism*, 42-43 (1963).

¹⁰ While the most familiar "Canons" are those adopted by the American Bar Association and approved by state bar associations, the state bar authorities have sometimes paraphrased, modified, and supplemented those rules. The A. B. A. Canons are reprinted annually at III Martindale-Hubbell Law Directory, Prefatory Section.

amended in certain particulars on ten subsequent occasions.¹¹ Those which most directly affect the subject at hand include Canon 27 (Advertising, Direct or Indirect),¹² Canon 28 (Stirring Up Litigation, Directly or Through Agents),¹³ Canon 35 (Inter-

¹¹ The first 32 Canons were adopted in 1908. Canons 33 through 45 were adopted in 1928. Subsequent meetings adopted Canon 46 (1933) and Canon 47 (1937). Amendments were made to Canon 7 (1937), Canon 11 (1933 and 1937), Canon 12 (1937), Canon 13 (1933), Canon 27 (1937, 1940, 1942, 1943, and 1951), Canon 28 (1928), Canon 31 (1937), Canon 33 (1937), Canon 34 (1933 and 1937), Canon 35 (1933), Canon 37 (1937), Canon 39 (1937), Canon 43 (1933, 1937, and 1942), and Canon 46 (1956). This year a new committee was appointed to consider further amendments or additions. See 9 American Bar News, No. 10, pp. 1-2 (1964).

¹² "27. Advertising, Direct or Indirect.

"It is unprofessional to solicit professional employment by circulars, advertisements, through touters, or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

"Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the Bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable."

¹³ "28. Stirring up Litigation, Directly or Through Agents

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred."

mediaries),¹⁴ Canon 40 (Newspapers),¹⁵ and Canon 47 (Aiding the Unauthorized Practice of Law).¹⁶ It is feared by some that group legal representation might also come into conflict with Canon 6 (Adverse Influences and Conflicting Interests),¹⁷ Canon 12 (Fixing the Amount of the Fee),¹⁸ Canon 24 (Right of Law-

¹⁴ "35. Intermediaries

"The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

"A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."

¹⁵ "40. Newspapers

"A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights."

¹⁶ "Aiding the Unauthorized Practice of Law

"No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

¹⁷ "6. Adverse Influences and Conflicting Interests

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

¹⁸ "12. Fixing the Amount of the Fee

"In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be

(Continued on next page)

yer to Control the Incidents of the Trial),¹⁹ and Canon 31 (Responsibility for Litigation).²⁰ Formal opinions by the American Bar Association Professional Ethics Committee²¹ have applied these Canons to outlaw numerous group representation situations. Thus, an automobile club's "legal department" cannot properly furnish legal services with respect to personal injury claims by or against club members.²² An attorney may not accept referrals from the trust department of a bank which are conditioned on the understanding that the referring bank will be designated as executor or trustee for the estate or trust in-

(Continued from preceding page)

employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

¹⁹ "24. Right of Lawyer to Control the Incidents of the Trial

"As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross-interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety."

²⁰ "31. Responsibility for Litigation

"No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."

²¹ The Committee on Professional Ethics and Grievances is a standing committee of the A. B. A. which issues both "formal" and "informal" opinions. The most recent compilation of formal opinions was published in 1957. Informal opinions and later formal opinions are published in the monthly issues of the American Bar Association Journal.

²² See A. B. A. Committee on Professional Ethics and Grievances, Opinions, No. 8 (1957).

volved.²³ Nor may an attorney assist a state bankers' association to publish a "legal" bulletin which gives advice in response to written questions submitted by member banks and identifies the attorney supplying the answer.²⁴ He may not contribute to the legal advice column of a trade association publication which answers individual members' problems.²⁵ Nor may he offer his services gratuitously to an impecunious labor union with the hope that he may receive employment from the members of the union.²⁶

Local bar associations have reached similar conclusions. Thus, the Bar Association of the City of New York challenged a retainer agreement for the general counsel of a tenants' membership corporation under which he would represent members in proceedings by landlords.²⁷ The same bar association concluded that an attorney may not by way of retainer represent members of a hair dressers' organization in defending them against suits by their customers.²⁸ The same Bar held that an attorney may not conclude an arrangement with a licensed nurses' organization which paid him ten dollars per year per member, whereby each member was entitled to consult with him on any legal problem.²⁹ Again, that association concluded that the Canons were violated by an attorney who donated services to a postal employees' union which provided free legal service to its members and published the availability of their selected counsel.³⁰ The New York County Lawyers' Association determined that an attorney employed by a teachers' association may represent the individual members on test cases affecting the general

²³ See *id.* at No. 122.

²⁴ See *id.* at No. 98.

²⁵ See *id.* at No. 162.

²⁶ See *id.* at No. 169. The extent of publicity afforded the counsel is apparently of great significance in determining the propriety of his association with the group. See *id.* at Nos. 273 and 285. While counsel for a corporation may properly be identified in the company's annual report to shareholders, he usually may not be so identified on the letterhead of communications to the public or bulletins to stockholders. See *id.* at No. 285.

²⁷ See Association of the Bar of New York, Opinion No. 714 (1948). Cf. *Dworken v. Apartment House Owners Ass'n.*, 38 Ohio App. 265, 176 N. E. 577 (1931). But see New York County Lawyers' Ass'n. Committee on Professional Ethics, Opinion No. 261 (1928), (attorney may represent group of landlords to defend against injury claims of tenants).

²⁸ See Association of the Bar of New York, Opinion No. 730 (1949).

²⁹ See *Id.*, Opinion No. 753 (1950).

³⁰ See *Id.*, Opinion No. 763 (1951).

group but may not otherwise act for the members without charge or at nominal rates, even though the problem involved the professional status of the individual teacher-member.³¹

In general, most state courts have reached similar conclusions with regard to group legal services, although some have been slightly more liberal and others been hesitant to invoke harsh disciplinary measures against attorneys participating in such programs. For example, Illinois, Ohio, and Rhode Island courts have disapproved of corporate automobile clubs who furnished specific legal services to their members.³² Massachusetts has allowed such an organization to pay for the services of attorneys selected by the members directly,³³ and the District of Columbia has allowed such an organization to negotiate its members' claims through lay-employees so long as no legal advice was involved.³⁴

Various states have objected to agreements between labor unions and attorneys under which the union recommended a particular attorney to its members. The Ohio Supreme Court reviewed a written agreement between attorneys and a truck drivers' local union.³⁵ Under its terms the attorneys received a fee from the union and consented to assist and represent the union members in simple workmen's compensation proceedings. They further agreed to represent members who wished to retain them in more complex compensation proceedings, at a contingent fee below the ordinary rate. The court concluded that the contract and its communication to the membership had the purpose and effect of "soliciting professional employment,"³⁶ and thereby "did breed litigation."³⁷ The attorneys were therefore suspended indefinitely from the practice of law.

³¹ See New York County Lawyers' Ass'n., Committee on Professional Ethics, Opinion No. 363 (1941).

³² Chicago Bar Ass'n. v. Chicago Motor Club, 362 Ill. 50, 199 N. E. 1 (1935); Goodman v. Motorists Alliance, 29 Ohio N. P. N. S. 31 (1931); Dworken v. Cleveland Auto. Club, 29 Ohio N. P. N. S. 667 (1931); Rhode Island Bar Ass'n. v. Automobile Service Ass'n., 55 R. I. 122, 179 Atl. 139 (1935). See Annotation, 106 A. L. R. 548, Cf. Land Title Abs. & T. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934).

³³ In Re Thibodeau, 295 Mass. 374, 3 N. E. 2d 749 (1936); but cf. In Re Maclub of America, 295 Mass. 45, 3 N. E. 2d 272 (1936).

³⁴ American Automobile Ass'n. v. Merrick, 117 F. 2d 23 (D. C. Cir. 1940).

³⁵ Cleveland Bar Ass'n. v. Fleck, 172 Ohio St. 467, 178 N. E. 2d 782 (1961), certiorari denied, 369 U. S. 861 (1962).

³⁶ *Id.* at 172 Ohio St. 470, 178 N. E. 2d 785 (Compare Canon 27, *supra* n. 12).

³⁷ *Id.* at 172 Ohio St. 472, 178 N. E. 2d 785 (Compare Canon 28, *supra* n. 13).

The plan which has received the greatest attention from the courts was the one organized by the Brotherhood of Railroad Trainmen. In some instances, the Brotherhood received a portion of fees charged by attorneys, purportedly to assist the union in maintaining its legal aid department. At certain times, the Brotherhood supplied investigators to assist designated counsel in preparing the cases of their members. However, the heart of the Brotherhood program has always been the selection of "regional counsel" who were recommended to the membership as particularly able in the handling of F. E. L. A. cases.³⁸ The attitudes of the courts of various states toward this program have been far from uniform.

The propriety of the Brotherhood plan has been considered by the courts of Missouri, Tennessee, New York, Illinois, California and Ohio. The plan apparently started in 1930. By 1933 it was already the subject of judicial consideration by an intermediate Ohio appellate court.³⁹ Two judges of that court found that the plan involved solicitation of business by and for the affiliated attorneys.⁴⁰ However, the third member of that court considered that the plan was "meritorious and worthy," that it is "not tainted with unlawful or unethical elements," and "that

³⁸ When the Brotherhood received compensation it took the varied forms of (a) a division of fees, (b) a portion of fees as reimbursement for investigative services, and (c) *quantum meruit* payment for investigation. The adequacy of selected counsel is subject to criticism on the basis that only sixteen are selected for the entire United States. Either such counsel would attempt to practice in different jurisdictions, despite different adjective legal rules and distance barriers, or they would select local counsel to handle the matter. In either event, the union has not itself designated appropriate local counsel.

³⁹ Petition of the Committee on Rule 28 of the Cleveland Bar Ass'n., 15 Ohio L. Abs. 106 (1933).

⁴⁰ See *id.* at 108: "The results of this plan are these: The Legal Aid Department by publication in the Brotherhood Journal, by circulating the locals, by personal representations and by about all the methods known, is constantly soliciting legal business for the respondent firm. That firm in turn, knowing exactly how its business is being solicited for it impliedly assents to such solicitation and because it expects to get a large volume of business fixes an ironclad fifteen percent contingent fee, plus a further five percent charge to be collected by it and paid over to the soliciting agency. It is the sheerest sophistry to say that under these circumstances the respondent is not itself soliciting. It is slight compliment to the perspicacity of others to assume that so flimsy a fabric can effectively disguise the real character of the arrangement. Even the old women that sit on the committee of Legal Ethics of the American Bar Association as one of the respondent firms graphically puts it (p. 553), ought not be deceived by such a device."

it is not unlawful or unethical for counsel to accept the employment."

At approximately the same time the plan was scrutinized by an intermediate appellate court in Illinois and a federal district court in New York. The Illinois court found "that the purpose of the Brotherhood is a worthy one, planned to prevent frauds upon its members and to aid them in the assertion of their legal rights. . . ." ⁴¹ In that case, however, the court was only indirectly concerned with principles of legal ethics. The attorney there sought to recover his fee from a railroad that had interfered with his representation of the railroad employee. The railroad claimed in defense that the attorney had been retained as a result of the Brotherhood plan and was therefore acting unethically in accepting the case. Thus, that court's apparent approval of the plan was only dictum to its determination in favor of the attorney's claim for fees. A recent decision in Ohio likewise upheld the claim for fees under these circumstances without passing upon the propriety of the Brotherhood plan as a source of representation.⁴² In New York, the federal district court evaluated the plan.⁴³ That court found "that the organization was performing a valuable service for its members," but that the attorneys who cooperated with the plan were in violation of the Canons of Ethics and subject to censure.⁴⁴

In due course, the plan was discussed by the courts of last resort in Missouri, California, Illinois, and Ohio. The highest courts of Missouri and California both found that attorneys participating in the Brotherhood program were violating the rules

⁴¹ *Ryan v. Pennsylvania R. R.*, 268 Ill. App. 364 (1932).

⁴² *Dombey, Tyler, Richards & Grieser v. Detroit, T. & I. R. R.*, 226 F. Supp. 345 (S. D. Ohio 1964).

⁴³ *In Re O'Neill*, 5 F. Supp. 465 (E. D. N. Y. 1933); *Doughty v. Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379 (1952). *Contra*, *Reynolds v. Gulf M. O. & T. P. Ry.*, No. 772 (unreported) (E. D. Tenn. 1946): "My idea is that there is no violation of professional ethics by an arrangement whereby the Brotherhood of Railroad Trainmen maintains a Legal Aid Department for the optional use of its members or families of deceased members. This is in accord with recognized practices of other organizations and would seem to be a proper method of obtaining qualified legal aid in prosecuting the claims of the members or families of deceased members. The members or families of deceased members do not have to take the services. I can see nothing improper in any lawyer being generally retained to accept employment under these conditions."

⁴⁴ See *In Re O'Neill*, 5 F. Supp. 465, at 466 (E. D. N. Y. 1933). Cf. *North Carolina ex rel. McLean v. Hice* (unreported) (Buncombe, N. C. Super. Ct.).

of professional ethics.⁴⁵ At the same time, the uncertainty of these decisions is emphasized by strong dissenting views and the refusal to discipline the attorneys involved so long as they did not continue to cooperate with the program.⁴⁶ Thus, while the Supreme Court of California found that the attorneys cooperating with the plan were guilty of solicitation, two dissenting justices believed that there was no breach of ethics and that the concept of group legal service was socially desirable.⁴⁷

The Illinois Supreme Court apparently approved of the substance of the Brotherhood plan as recently as 1958.⁴⁸ Refusing to discipline the attorneys, the court expressly stated that the Brotherhood could properly advise its members as to the wisdom of obtaining counsel and the names of such counsel who have the capacity to handle such claims successfully. The Illinois court did object to payments by counsel to the union, which were then a regular part of the Brotherhood program. By contrast, the highest court of Ohio unanimously voted to suspend an attorney from practice for cooperating with the Brotherhood program.⁴⁹

A review of these decisions indicates that most of the judges who condemned the Brotherhood referral plan found it to involve solicitation, advertising, and furtherance of the union's unauthorized practice of law. But some of these same judges expressed qualified approval of the group legal service concept, while ruling that the particular program before them presented unreasonable

⁴⁵ *Hulse v. Brotherhood of Railroad Trainmen*, 340 S. W. 2d 400 (Mo. 1960); *Hildebrand v. State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1950). See also *Young v. Gulf, M. & O. Ry.*, No. 3957 (unreported) (E. D. Mo. 1946).

⁴⁶ In the *Hulse* case, *supra* n. 45, the Missouri court dismissed contempt proceedings against the counsel on their representation that they would desist from the practices found to be objectionable. In the *Hildebrand* case, *supra* n. 45, the California court overruled the commissioners' recommendation of suspension for four years "in view of the somewhat divergent implications found in the cited cases" and the absence of any prior California decision on the issue.

⁴⁷ Justice Carter and Justice Traynor each wrote extended dissenting opinions. See *Hildebrand v. State Bar of California*, 36 Cal. 2d 504, 518, 519, 225 P. 2d 508, 522, 523 (1950).

⁴⁸ *In Re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163 (1958). The decision presents ethical guidelines for the Brotherhood and its counsel in effecting the plan. The union's employees may not carry legal retainer contracts or copies of settlement checks. Counsel may not compensate the Brotherhood or its officials, and the Brotherhood may not fix fees for the counsel. The attorney-client relationship must remain individual and personal.

⁴⁹ *Columbus Bar Ass'n. v. Potts*, 175 Ohio St. 101, 191 N. E. 2d 728 (1963).

abuses of that concept.⁵⁰ The members of the judiciary who denied the propriety of the Brotherhood plan uniformly relied upon the letter (if not the spirit) of the written canons. Those who defended the plan made little effort to justify the plan within the strict framework of the accepted canons, but rather approached the subject from a broader and more general view of ethics.⁵¹

The Federal Constitution

It is only within the last ten years that legal ethics and attorney disciplinary proceedings have been found to involve federal constitutional questions. In 1957 the Supreme Court ruled that the right to practice law is a constitutionally protected property right so that a state could not exclude a person from that practice in a manner or for reasons that violated the due process clause or the equal protection clause of the Fourteenth Amendment.⁵² Then, approximately one year before the *Brotherhood* decision, the Court overruled a Florida court that sought to regulate professional practice on the ground that the Florida ruling had failed to yield to the supremacy of federal law. In that case, the state court had prohibited persons not licensed to practice law within its boundaries or elsewhere from representing clients on matters before the federal Patent Office and from holding themselves out as patent counsel for that purpose. Finding that these persons were authorized to so act by the federal Patent Office, the United States Supreme Court held that Florida had no power to interfere.⁵³

The immediate forerunner to the *Brotherhood* case was the decision in *N. A. A. C. P. v. Button*.⁵⁴ In the *N. A. A. C. P.* case, Virginia had enjoined the association from employing counsel to represent its own members and others on civil rights matters. The *N. A. A. C. P.* had followed a regular program of recommending legal proceedings and providing counsel for proceedings on civil rights matters in which the association had an interest. Virginia found that this activity constituted solicitation, the unauthorized

⁵⁰ Such an approach may be the most fruitful in future matters in view of the Supreme Court *Brotherhood* decision; *supra* n. 1.

⁵¹ See, e.g., opinions of Justice Carter and Justice Traynor, cited *supra* n. 47.

⁵² *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U. S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U. S. 252 (1957).

⁵³ *Sperry v. State ex rel. Florida Bar*, 373 U. S. 379 (1963).

⁵⁴ 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

practice of law, and the involvement of intermediaries.⁵⁵ In reversing the Virginia court's order, the Supreme Court seemingly placed considerable emphasis on the fact that this procedure was necessary to protect constitutionally guaranteed rights of Virginians who would otherwise have difficulty in obtaining counsel. The court asserted that counsel were not always readily available to represent the civil rights cause in Virginia courts, so that these somewhat unpopular causes were not truly solicited.⁵⁶ In the social context of the N. A. A. C. P. activities, the organization was found to be seeking lawful objectives of equality before the law rather than stirring up litigation. The majority opinion was careful to point out that group legal services generally were not being judged by the court.⁵⁷ Indeed, a footnote to this portion of the opinion refers specifically to the plan of the Brotherhood of Railroad Trainmen, and acknowledges the divided reaction to that plan in the state courts.

In each case the court said:⁵⁸

Although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioners' activities,

⁵⁵ The Virginia court found that the N. A. A. C. P. program violated criminal statutes against solicitation or the canons of ethics or both. The language of the statute (enacted in 1956) and the Virginia version of the canons are reprinted in the Supreme Court opinion at 371 U. S. 423-27.

⁵⁶ See *id.* at 443-44: "Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia Lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor proof that any assisted Negro litigants have desired, but have been prevented from retaining, the services of other counsel. We realize that an N. A. A. C. P. lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice."

⁵⁷ See *id.* at 441-42: "Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed."

⁵⁸ See *id.* at 444; see also *Brotherhood of Railroad Trainmen v. Virginia*, 84 S. Ct. 1113, 1117 (1964). Cf. *Bates v. Little Rock*, 361 U. S. 516, 524 (1960).

which can justify the broad prohibitions which it has imposed.

The N. A. A. C. P. case laid the foundation for the subsequent *Brotherhood* decision by overruling state prohibitions of group legal services on the ground that such prohibitions interfered with rights guaranteed by the First Amendment. Freedom of speech and assembly for the N. A. A. C. P. and its members included the right to collectively advise its membership of the need for legal protection and the availability of specified counsel. The burden of showing that these prerogatives had been abused by the N. A. A. C. P. or its counsel was placed upon the enforcing state. The court did not say that this organization or any other organization could ignore the right and duty of the states to regulate the practice of law. Surely, such regulation is an important element of the police powers of the states, since the regulation of legal practice may well be essential to the maintenance of law itself. Instead, state police powers involved in the regulation of professional legal services must not be used to deny First Amendment rights where the constitutionally protected rights are real and substantial while the effect of allegedly improper practice is imagined or inconsequential. It might be said that the Supreme Court weighed the conflicting interests and found that the allegedly improper conduct by the N. A. A. C. P. involved a lesser evil than interference with the organization's right to promote its members' constitutional interests. Thus, the Court apparently denied Virginia's right to attack this particular form of group legal services without denying Virginia the right to curb abuses if their effect could be demonstrated in more than theoretical terms.

The culmination of recent judicial pronouncements on group legal services was the case of *Brotherhood of Railroad Trainmen v. Virginia*.⁵⁹ The Virginia State Bar had sought and obtained an injunction against the Brotherhood on the grounds that its plan constituted solicitation of legal business and unauthorized practice of law. The trial court found that the Brotherhood's plan resulted in the "channeling of all, or substantially all" prospective F. E. L. A. claims to lawyers chosen by the Department of Legal Counsel of the Brotherhood. The Supreme Court of Virginia affirmed that order, rejecting contentions by the Brotherhood that the order abridged its members' rights under the First and

⁵⁹ 377 U. S. 1, 84 S. Ct. 1113 (1964).

Fourteenth Amendments. The federal Supreme Court reversed, holding that the order contravened the members' rights to freedom of speech, petition and assembly.

The opinion of the Court was delivered by Justice Black, with Justice Stewart not participating in the decision, and Justices Clark and Harlan dissenting. Speaking for the six member majority, Justice Black first reviewed the history of the Brotherhood itself and its role in the adoption and enforcement of the Federal Employers Liability Act. The majority opinion briefly outlined the Brotherhood plan in the following language:⁶⁰

Under their plan the United States was divided into sixteen regions and the Brotherhood selected, on the advice of local lawyers and federal and state judges, a lawyer or firm in each region with a reputation for honesty and skill in representing plaintiffs in railroad personal injury litigation. When a worker was injured or killed, the secretary of his local lodge would go to him or to his widow or children and recommend that the claim not be settled without first seeing a lawyer, and that in the Brotherhood's judgment, the best lawyer to consult was the counsel selected by it for that area.

On the basis of representations by the Brotherhood that their investigation staff was supplied at the Brotherhood's own expense and that no sharing of fees between the Brotherhood and the selected counsel was practiced, the Court did not consider the propriety of fee payments by the counsel to the Brotherhood for investigation services or other purposes.⁶¹

The guarantees of the First Amendment for free speech, petition, and assembly were applied to the facts involved as follows:⁶²

The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of the constitutionally guaranteed right to assist and advise each other.

⁶⁰ See *id.* at 84 S. Ct. 1115.

⁶¹ See *id.* at 84 S. Ct. 1116.

⁶² See *id.* at 84 S. Ct. 1116.

The majority opinion in the *Brotherhood* case, as in the *N. A. A. C. P.* case, emphasized the state's right to regulate the process of law but insisted that such regulation must defer to personal constitutional rights. Here, the Court said that Virginia was not truly seeking "to halt . . . a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice." Concluding that this is not "ambulance chasing," the Court referred to the similar practice of unions in Great Britain and cited the dissenting opinions in the earlier California Supreme Court decision.⁶³

While the opinion could be read narrowly to apply only to organizations seeking to preserve rights of members under federal laws, the fair intendment of the majority opinion would seem to go beyond that scope. But the opinion does iterate the power of the state to challenge this or any other plan of group legal services which do in fact produce significant harmful results.⁶⁴

In the present case the state again has failed to show any appreciable public interest in preventing the *Brotherhood* from carrying out its plan to recommend the lawyers it selects to represent injured workers.

For these reasons the majority forbade Virginia from interfering with the members, the *Brotherhood* or their counsel in carrying out this "constitutionally protected plan." Therefore, the injunction was vacated and the case was remanded for further proceedings not inconsistent with the opinion.

The dissenting opinion insists that the decision "relegates the practice of law to the level of a commercial enterprise," and permits a labor union "to engage in the unauthorized practice of soliciting personal injury cases from among its membership on behalf of sixteen regional attorneys. . . ." ⁶⁵ The dissenters conclude that the plan "degrades the profession, proselytes the approved attorneys to certain required attitudes and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." Rejecting the premise that only counsel selected by the *Brotherhood* are competent to assist the membership, the dissent distinguishes the *N. A. A. C. P.* case

⁶³ *Supra*, n. 47.

⁶⁴ See *Brotherhood of Railroad Trainmen v. Virginia*, 84 S. Ct. 1113, 1117 377 U. S. 1 (1964).

⁶⁵ *Id.* at 84 S. Ct. 1118-20.

on the ground that it involved the protection of political expression and constitutionally protected civil rights. Justice Clark also refers to the fee-splitting procedure of the Brotherhood and their counsel and the failure of the Brotherhood to reform despite its protestations in previous state court proceedings.

In substance, this dissenting opinion agrees with the lower court that "gross abuses of channeling and soliciting litigation" can and should be regulated by the state. The evils envisaged by the dissenters are "disrepute to the legal profession" and disadvantage to the Brotherhood members themselves whose claims would be represented by select attorneys under the silent control of the Brotherhood president. Finally, the dissent expressed fear that the decision will open the flood gates to other groups, such as automobile associations, to obtain group legal representation.⁶⁶

The Past as Prologue

The majority decision in the *Brotherhood* case might have been anticipated. The principle of group legal services has acquired increasing respectability, so that a favorably inclined court was able to find sufficient justification for its acceptance. Prominent members of the bar, including at least one judge of the Supreme Court, had previously expressed approval of group representation generally. Robert T. McCracken, former president of the Pennsylvania Bar Association and former chairman of the Ethics Committee of the American Bar Association, conducted a survey in 1951 of twenty-five states and ascertained that legal services were provided by unions for members' private affairs in six states which considered such practice professionally proper and commonly accepted.⁶⁷ In two other states, the issue was considered to be in doubt. A special committee on "Lawyers and Organized Labor" which functioned as a part of the American Bar Association's Survey of the Legal Profession reached the following conclusion in their 1952 report:⁶⁸

⁶⁶ The two dissenters in the *Brotherhood* case had likewise dissented for similar reasons in the *N. A. A. C. P.* decision. In the *N. A. A. C. P.* case they were joined by Mr. Justice Stewart, who did not participate in the *Brotherhood* decision.

⁶⁷ See McCracken, *Report on Observance by the Bar of Professional Standards*, 37 Va. L. Rev. 399 (1951).

⁶⁸ See *Report of Committee on Lawyers and Organized Labor*, 5 Ind. & Labor Rel. Rev. 343, 361 (1952).

More than three quarters of the (labor) lawyers report that they do personal legal work for union officials, while seven out of eight labor lawyers state that they do general work for individual members of the union. Approximately one quarter of these lawyers report that they are paid for this work by the union, while the remainder are paid directly by the individual members of the union.

* * * * *

The work for the individual union member covers a wide variety of fields.

* * * * *

There seems to be a definite need for education of the union members, as well as re-interpretation of the Code of Legal Ethics in this field, to make available to union members more adequate legal services.

One member of the committee was Arthur J. Goldberg, then general counsel of the Congress of Industrial Organization, and now one of the Justices of the Supreme Court. Similar sentiments were expressed in a report of the Committee on Legal Representation of the Section of Labor Relations Law of the American Bar Association in 1960.⁶⁹ Significant law review comment was in accord.⁷⁰

Henry S. Drinker, who served for many, many years as chairman of the Committee on Professional Ethics of the American Bar Association, likewise appears to have supported these conclusions in his treatise on legal ethics:⁷¹

A somewhat different although related problem is presented where a group of persons having a common interest combine to employ a lawyer to protect or further such interest. If the group is small and not organized in the form of a club or association so as to constitute an entity distinct from its members, the case is evidently not covered by the language of Canon 35. Thus a partnership may, it would seem, employ a lawyer on an annual retainer to handle all the legal problems not only of the firm but of the individual members, including for example individual income-tax problems, leases or traffic violations. So, it would seem, might the immediate

⁶⁹ See Report of Committee on Legal Representation, Section of Labor Law, American Bar Association, pp. 213-15 (1960).

⁷⁰ See Note, 46 Ill. L. Rev. 323, 327 (1951); Note, 5 Vand. L. Rev. 244, 247 (1952); Note, 64 Harv. L. Rev. 1374, 1376 (1951); Note, 3 Stanf. L. Rev. 549, 553 (1951); Note, 20 U. of Pitt. L. Rev. 85, 97 (1958); Note, 72 Harv. L. Rev. 1334, 1346 (1959).

⁷¹ Drinker, Legal Ethics, 165-67 (1953).

members of a family employ a family lawyer. It is difficult to see why the problem is basically different as the group grows larger or at what point the line should be drawn.

* * * * *

It is not believed that the Canon will prevent the labor union from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public.

Comparable statements were made by such outstanding leaders of the legal profession as Professor K. N. Llewellyn of the Columbia University Law School⁷² and Professor Lowell Turrentine of the Stanford University Law School.⁷³

Within the last five years, the California Bar Association has repeatedly considered amendments to the rules of ethics which affect group legal services. Distinguished leaders of the California Bar have taken opposite positions on this question.⁷⁴ While the Board of Governors of the Bar Association has recommended a new rule which would condemn most group representation, that change has apparently not been adopted.⁷⁵ However, the debates on its adoption have brought forward effective advocates of both positions. In an Ohio disciplinary proceeding discussed earlier, which arose out of a contract with a truck drivers' union, the following comments were submitted to the court in the form of a letter from Dean Roscoe Pound:⁷⁶

⁷² See Llewellyn, *The Bar's Troubles, and Poulitices—and Cures*, 5 *Law & Cont. Prob.* 104, 120 (1938).

⁷³ See Turrentine, *Legal Service for the Lower Income Group*, 29 *Ore. L. Rev.* 20, 29-30 (1949).

⁷⁴ See Report of Committee on Group Legal Services, 34 *Cal. State Bar J.* 318 (1959) (recommending adoption by California of A. B. A. Canon 35); Report of Committee on Group Legal Services, 35 *Cal. State Bar J.* 710 (1960) (recommending adoption of new California Rule 20).

⁷⁵ Reports on the debates on Proposed Rule 20 appear at 39 *Los Angeles Metropolitan News*, No. 82, pp. 1, 8 (May 25, 1961); *id.* at No. 83, pp. 1, 8 (May 26, 1961); *id.* at No. 84, pp. 1, 7 (May 29, 1961).

⁷⁶ This letter was submitted during oral argument as a supplement to the brief for the attorneys whose conduct was challenged in *Cleveland Bar Ass'n. v. Fleck*, *supra* at n. 35.

Our canons of professional ethics were framed many years ago before the rise of conditions which materially affect the administration of justice in the courts of today. Since I came to the Bar in 1890 I have seen many things which at that time were regarded as doubtful or even unprofessional have come to be looked at differently. A notable example is the way which something not unlike advertising in the published law list has come to be regarded as a matter of course. That an increasing number of persons injured in industry are having to be provided for, and that workers in industry are increasingly members of trade unions which have assumed increasingly a function of looking after the individual interests of members, makes it natural that trade unions are interesting themselves in seeing that their members are properly represented in claims for workmen's compensation. Under conditions today a reasonable agreement such as that involved in your case ought not to be in any wise regarded as objectionable. The truth is that ideas which obtained in the small rural agricultural community of the beginnings, in which an aggressive and unscrupulous person could stir up litigation where otherwise differences would be settled peaceably, has no application to the conditions involved in workmen's compensation claims today. The rules of professional ethics ought to be adjusted to the conditions of today if necessary, but I take it that leaving them as they stand, the canons do not involve any legitimate objection to what was done in your case.

With such revered personages as Dean Pound speaking out in favor of group legal services, is it surprising that the Supreme Court in the *Brotherhood* case by-passed objections based largely on the language of the Canons of Ethics?

One cannot anticipate with any degree of reliability whether the decision by the Supreme Court in the *Brotherhood* case will be given narrow or wide application. In subsequent cases, the Court may limit its ruling to legal advice and representation on matters arising under federal law or to legal advice and representation on behalf of members of an unincorporated non-profit association.⁷⁷ Both the *N. A. A. C. P.* and the *Brotherhood* decisions fall into those two categories. On the other hand, the Court may use these decisions as a springboard to further expansion

⁷⁷ One might criticize the *Brotherhood* and *N. A. A. C. P.* decisions as naively giving too great prerogatives to non-profit associations, if the non-profit character of the organization is critical to the decisions, since non-profit entities (like profit making entities) are often instrumentalities of the few individuals who control them.

of group legal services, even though the subject matter of the legal advice concerns state law and the organization retaining the attorney operates for profit. Indeed, it is difficult to justify any reasonable distinction between profit making and non-profit organizations who might retain attorneys, where the basis for denial of state control is the right of the members to act collectively in the selection of counsel. Likewise, the distinction between protection of rights under federal law and rights under state law may be more illusory than real, when it is remembered that the rationale of both recent Supreme Court decisions is the constitutional protection provided by the First and Fourteenth Amendments.

It seems obvious however, that the state bar associations will continue to resist expansion of group legal services—notwithstanding the decision in the *N. A. A. C. P.* and *Brotherhood* cases. Almost every state bar association filed a brief as *amicus curiae* in support of a petition for re-hearing in the *Brotherhood* case.⁷⁸ Subsequent to the denial of that re-hearing, various spokesmen for the organized bar have repeated their intention to resist the effect of the *Brotherhood* case and any expansion of its meaning.⁷⁹ It appears that an attorney who embarks boldly upon active group representation may do so at his own peril, since some leaders of the bar have vowed to combat this movement with disciplinary proceedings.

Despite these uncertainties, there is reason to presume that group legal services will be commonplace over a broad spectrum of activities in the not too distant future. Whether this will be accomplished by modification of the Canons of Ethics in response to constitutional decisions, or by social pressures which lead to different interpretation of the present Canons, is a matter of speculation. It does not seem likely that the legal profession can indefinitely resist the movement that has encompassed other professional activities in this country and has already caused equivalent changes in other countries. Perhaps a more realistic target

⁷⁸ The A. B. A. was granted leave to file its brief as *amicus curiae*, and the rehearing was denied, on June 1, 1964 (84 Sup. Ct. 1625).

⁷⁹ See, e.g., 9 American Bar News, No. 9, p. 4 (Aug. 15, 1964) (remarks of Walter E. Craig, retiring president of the A. B. A.). Informal opinions of the Ethics Committee subsequent to the *Brotherhood* ruling have condemned various group practices. See Opinions C-687 and C-699. 50 A. B. A. J. 829 (Sept. 1964). See also *The Brotherhood Case* (Editorial), 50 A. B. A. J. 841 (Sept. 1964).

for the bar is the curb of abuses arising from group legal services, rather than a blanket objection to the concept itself.

It is manifestly undesirable for any official of an organized group to control the group's attorney, so as to eliminate a true professional relationship between that attorney and the group member. But this may not be a necessary consequence of group representation. If, for example, emphasis were placed upon the primary duty of the group attorney to the individual members, the "control" circumstances would be no more objectionable than the familiar referral of bank customers to an attorney by a bank executive. The desire of an attorney to ingratiate himself with the group leader is no more disturbing than the equivalent hopes of an attorney dealing with any responsible community leader who can be expected to refer clients.⁸⁰ An attorney who permits a real conflict of interest without full disclosure can and should run the risk of disciplinary repercussions. The use of group legal services as a means for blatant advertising and solicitation could be curbed by insisting that the organization publish only the availability of competent counsel without identifying that attorney in mass mailings or other mass communication media. Complete fiscal and operational independence of the group's attorney from the group itself would reduce the likelihood of any significant efforts by the group itself to practice law, and mitigate the objection to the activity as an unauthorized practice of law by non-legal organizations. And, the broader objection to group legal services, as encouraging commercialism in the practice of law, would have to be met by diligent efforts of the bar to enforce adherence to dignified professional behavior.

The above discussion is not intended to suggest that group legal services will be accepted without trauma to the profession. Rather, we may conclude that it will come to be common practice whether we now approve it or not, that it does have some socially desirable features, and that its greatest abuses are at least partly subject to control. Such control will not be simple to accomplish, but early attention to its formulation is an appropriate matter for the careful consideration of all attorneys.

⁸⁰ The same regrettable economic pressures can and do induce counsel to seek substantial corporate retainers from whom they expect to obtain a steady flow of business. The manner in which such retainers are pursued and not the retainers themselves is potentially objectionable.